198-19

New Jersey Commissioner of Education

Final Decision

Tamaika DeFalco,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

Synopsis

Petitioner, a tenured Spanish teacher employed by the Hamilton Township Board of Education (Board), appealed the Board's determination that she had committed an act of harassment, intimidation and bullying (HIB) pursuant to the New Jersey Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.* The Board found that petitioner committed HIB against a student classified to receive special education services when, in the presence of other students and an in-class aide in her Spanish class, she inappropriately directed the classified student to visit the child study team or guidance office if he was unable or unwilling to perform work in her class. Petitioner requested that the Commissioner enter an order vacating the Board's determination of HIB. The Board contended that it acted in a reasonable manner, and that – under the legal standard governing the Commissioner's review of the action of a local school board entrusted to determine HIB matters – its action was not arbitrary, capricious or unreasonable. The Board filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: petitioner's argument that the Board failed to provide her with due process because she had no opportunity to cross examine witnesses relied upon by the Board when deciding she had committed an act of HIB, is without merit as – pursuant to the Act – due process in an HIB inquiry does not require a full evidentiary hearing before the Board or the ability to cross examine witnesses; petitioner admitted that she made statements to a classified student in her class, directing him to visit the child study team, caseworker, or In-School Alternative Program; this statement was made in front of the class and had the distinct capacity to point out to the other students the actual or perceived characteristic of the classified student's mental or sensory disability; petitioner knew, or should have known, that her comments would have the effect of 1) placing the student in reasonable fear of emotional harm, 2) insulting or demeaning him, and 3) creating a hostile educational environment. The ALJ concluded that the Board's determination that petitioner committed an act of HIB was not arbitrary, capricious or unreasonable. Accordingly, the petition was dismissed.

Upon review, and finding the petitioner's exceptions to be unpersuasive, the Commissioner concurred with the ALJ's findings and conclusions in this matter. Accordingly, the Initial Decision of the OAL was adopted as the final decision for the reasons well stated therein. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 26, 2019

OAL Dkt. No. EDU 2365-18
Agency Dkt. No. 9-1/18

New Jersey Commissioner of Education

Final Decision

Tamaika DeFalco,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) been reviewed and considered, as have the exceptions filed by the petitioner, Tamaika DeFalco, pursuant to *N.J.A.C.* 1:1-18.4. The respondent, the Hamilton Township Board of Education (Board), did not file a reply.

This matter concerns an allegation of harassment, intimidation, and bullying (HIB) committed by a teacher against a student. The Administrative Law Judge (ALJ) found that due process in an HIB inquiry does not require that a staff member be afforded a full evidentiary hearing before the Board or the ability to cross examine witnesses. Regarding the substance of the allegation, the ALJ noted that petitioner admitted she made statements to a classified student in her class, directing him to visit the child study team, caseworker, or the In-School Alternative Program; such a statement, made in front of the class, had the distinct capacity to point out to the other students the actual or perceived characteristic of the classified student's mental or sensory disability. The ALJ found that the petitioner knew, or should have known, that her comments would have the effect of 1) placing the student in reasonable fear of emotional harm, 2) insulting or demeaning him, and

3) creating a hostile educational environment for him. As such, the ALJ found that the Board's determination that the petitioner committed an act of HIB was neither arbitrary nor capricious.

In her exceptions, the petitioner argues that a finding of HIB mandates constitutionally adequate due process protections, including the right to cross examine witnesses. The petitioner contends that the HIB finding constitutes a "badge of infamy" accompanied by "enormous reputational loss." The petitioner cites to *Matter of Allegations of Sexual Abuse at East Park High School*, 314 *N.J. Super.* 149 (App. Div. 1998) for the proposition that allegations against a teacher must be the subject of a hearing in which the teacher has the opportunity to challenge evidence, cross examine witnesses, and present evidence of her own. The petitioner argues that although boards of education are not required to conduct plenary hearings regarding HIB allegations, such a hearing must be available – at the Office of Administrative Law (OAL) – before a final order becomes effective. The petitioner claims that because no such hearing was conducted by the ALJ, the Initial Decision must be rejected.

Next, the petitioner contends that the standard for HIB findings against teachers is a preponderance of the evidence, rather than the arbitrary and capricious standard applied to HIB findings against students. The petitioner claims that the Board stands in a different role in relation to its teachers than it does to its students, and that teachers are subject to reputational loss, direct employment consequences, and the potential foreclosure of future employment opportunities, while students are afforded confidentiality protections under federal and state privacy laws and cannot be denied access to a free an appropriate public education as the result of an HIB finding. As such, according to petitioner, review of an HIB allegation against a teacher under an arbitrary and capricious standard is constitutionally inadequate.

Finally, the petitioner argues that there is a significant factual dispute as to whether her statements fell within the acceptable scope of the student-teacher relationship. The petitioner cites to *S.A. and C.A. o/b/o G.A. v. Moorestown Bd. of Ed.*, Commissioner Decision No. 125-18,

decided April 23, 2018, in which the Commissioner found that a teacher's conduct – checking a classified student's work and test scores in the presence of other students – was not motivated by the student's status as a special education student and was a required part of her job as a special education teacher. The petitioner claims that the limited scope of the Initial Decision's review improperly foreclosed inquiry into the details of how a teacher should assist a student in accessing special education services.

Upon review, the Commissioner concurs with the ALJ that the Board's procedures, as applied in this case, complied with the due process requirements of the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq*., and that the Board's determination that the petitioner had committed an act of HIB was not arbitrary, capricious, or unreasonable.

The Commissioner has previously addressed the question of the nature of a board of education's hearing regarding an HIB allegation and concluded that the Act does not require trial-type adversary proceedings. *L.K. and T.K., obo A.K. v. Mansfield Bd. of Educ.*, Commissioner Decision No. 107-19 (April 22, 2019). The Act provides that "[a]t the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents." *N.J.S.A*. 18A:37-15(b)(6)(d). Provisions for discovery, cross-examination, or other procedures more judicial in nature could have been included by the Legislature in the Act, but were not, and the Commissioner declines to require such procedures when they are not supported by the plain language of the statute.

The Commissioner finds unpersuasive the petitioner's argument that a plenary hearing must be conducted at the OAL. When a contested case is transmitted to the OAL, the proceedings are conducted pursuant to the New Jersey Uniform Administrative Procedure Rules, under which motions for summary decision are permitted. *N.J.A.C.* 1:1-12.5. The standard for granting a motion for summary decision is well-established by *Brill v. Guardian Life Insurance*

Company of America, 142 *N.J.* 520, 540 (1995), and the ALJ followed that standard in determining that there are no material facts in dispute, given that petitioner admitted to making public statements that referenced a student's special education status.

Staff members accused of committing an act of HIB are entitled to the due process guaranteed by the Act, including the same right to a hearing before the Board that is provided to parents or guardians of students. *Gibble v. Hunterdon Central Bd. of Educ.*, Commissioner Decision 254-16 (July 13, 2016). Nothing in the Act suggests that staff members are entitled to due process protections that exceed those provided to students involved in HIB investigations. As such, the standard of review to be applied is the same for both students and teachers. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration [,]" such that the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184 (1973). Here, the Board followed the procedures required by the Act by making the petitioner aware of the charges and the evidence on which they are based, and by offering the petitioner the opportunity to present evidence to the Board – an opportunity of which she availed herself. Following those procedures, the Board determined that the petitioner had committed an act of HIB. Nothing in the record indicates that the Board, in making that determination, operated in an arbitrary, capricious, or unreasonable manner.

Regarding the petitioner's argument that a factual dispute exists about whether her conduct fell within the normal student-teacher relationship, the Commissioner agrees with the ALJ that this issue is a "red herring." Initially, District Policy 2466 – which is attached as an exhibit to petitioner's exceptions – clearly states, "The Board of Education guarantees the privacy provided by

law that no pupil with a disability be labeled publicly," and sets forth procedures for "coding" this type of information, including referring to special education classes by the teacher's name. The petitioner's conduct is contrary to this policy and thus cannot be construed to fall within the normal student-teacher relationship. Moreover, as the ALJ noted, it is difficult to believe that the petitioner did not understand that she could privately contact the student's caseworker if she were concerned about his ability to complete the work in her class.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter and the petition is dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: July 26, 2019
Date of Mailing: July 26, 2019

[1] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c*. 36 (*N.J.S.A*. 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2365-18

AGENCY DKT. NO. 9-1/18

TAMAIKA DE FALCO,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP HAMILTON,

Respondent.

Edward A. Cridge, Esq., for petitioner (Mellk O'Neill, attorneys)

Joseph D. Castellucci, Jr., Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: May 23, 2019

Decided: June 25, 2019

BEFORE **JEFF S. MASIN,** ALJ (Ret., on recall):

The Hamilton Township Board of Education (Board) found that Tamaika DeFalco committed an act of Harrassment, Intimidation and Bullying (HIB) in violation of Board "Policy 5512 Harassment, Intimidation and Bullying." By Verified Petition, she seeks to have the Commissioner of Education overrule the Board's decision. The Board responds that it acted in a reasonable manner, and that under the legal standard governing the Commissioner's review of the action of a local school board entrusted to determine HIB matters, its action was

neither arbitrary, capricious nor unreasonable and therefore must be upheld. The Board moves for summary decision, as authorized by N.J.A.C. 1:1-12.5.

The Board notified Ms. DeFalco of its decision on October 9, 2017. She filed her Verified Petition on January 16, 2018. The Board filed an Answer on February 5, 2018. The contested case was transferred to the Office of Administrative Law on February 13, 2018. A prehearing conference was held by Administrative Law Judge Patricia Kerins on July 16, 2018. A Protective Order was issued on July 17, 2018. The Board moved for summary decision on March 27, 2019. The contested case was transferred to this judge on April 9, 2019. Ms. DeFalco responded to the Board's motion on April 29, 2019. Oral argument was held on May 23, 2019, following which the record for the motion closed.

According to the Board's Statement of Undisputed Facts, Ms. DeFalso is a tenured Spanish teacher. B.L. is a student classified to receive special education services who was in Ms. DeFalco's Spanish class in the 2016-2017 school year. Lisa Kowalski is an education assistant employed by the Board who served as an in-class aide in DeFalco's class. On June 7, 2017, in the presence of several students and Ms. Kowalski, DeFalco directed B.L. to visit the child study team or guidance office if he was unable or unwilling to perform classwork. According to the Board, this action directed attention to B.L.'s status as a special education student. DeFalco e-mailed a school counselor, Barbara Arora, and the learning consultant on the child study team, Lisa Scaringelli, advising them that B.L. had his head on the desk and, as a result, she had asked B.L. to visit the nurse, the school counselor, or his caseworker. DeFalco also advised that when B.L. refused all of these options, she "told him he should go down to [the In-School Alternative Program ("ISAP") if he wants to lay on a desk, as it is not permitted in the class." She then requested the e-mail address of B.L.'s case manager. On June 8, 2017, B.L.'s special education teacher, Jessica Sawicki (formerly Jessica Zipko) e-mailed Principal Brian Smith, reporting "Petitioner's inappropriate behavior toward B.L." Sawicki found the incident had broken confidentiality and "truly embarrassed B.L." On June 12, 2017, Ms. Kowalski advised Mr. Smith that DeFalco told B.L. that "if he [did not] feel well he could go to the nurse." He declined to go to the nurse or to complete his work and DeFalco then "asked him if he wanted to talk to someone in child study or guidance because if he [did not] like being there or if the work was too difficult[,] then maybe they could help him

or put him in a different class." When he refused to visit the child study team or guidance office, "he was asked to go sit in ISAP and he could sleep there."

On June 14, 2017, B.L. reported to Robin Gesuelli, the anti-bullying specialist or HIB coordinator and student assistance counselor, that DeFalco's comments made him feel "uncomfortable and embarrassed." A.V., a student who witnessed the incident, provided a statement corroborating B.L.'s statement. A letter was then sent to DeFalco notifying her of the allegation that she had committed an act of HIB and that an investigation would be conducted by the school's anti-bullying coordinator, Nathan Webber, within ten school days of the written report. B.L.'s mother was also notified of the investigation.

The Board's Statement of Undisputed Facts details the investigation that followed. For the present, it is sufficient to note that various witnesses were interviewed, as was Ms. DeFalco. At the conclusion of the investigation on June 27, 2017, the Superintendent of Schools determined that DeFalco's conduct had caused "substantial disruption or interference with orderly operation of school or the rights of other students." The Superintendent wrote that B.L. believed that DeFalco "insulted his intelligence" and "an adult witness verified that . . . [Petitioner]" made the alleged statements. "The adult witness also verified that "the personal conversation continued after the student left and that the class was laughing due to the conversation in class." The superintendent found that DeFalco's conduct was "[r]easonably perceived as motivated by actual or perceived characteristic" and "was insulting or demeaning to B.L. because [DeFalco] was aware of B.L.'s IEP." B.L. suffered emotional harm given that the other students in the class were made aware of B.L.'s disability and laughed after DeFalco stated "If you are struggling in this class, I can write you a pass to child study and you can be removed" and B.L. refused to return to the class. In the Superintendent's opinion, DeFalco's conduct created a hostile educational environment because it caused B.L. emotional harm and led the other students to perceive the classroom environment as not a supportive educational environment. Given this, the Superintendent determined that the incident involved a violation of the Board's HIB Policy.

On July 27, 2017, Ms. DeFalco was notified by letter that the results of the HIB investigation had been reported to the Board and would remain on file. Her file would include a letter noting the incident and "[u]pon returning to school on September 1, 2017, [DeFalco]

will be required to participate in remedial training on HIB and building positive relationships in the classroom." On September 17, 2017, the Board conducted a hearing at DeFalco's request regarding the Superintendent's report. At that hearing, DeFalco "denied making any disparaging or demeaning comments towards B.L in her class." On October 9, 2017, the Board affirmed the Superintendent's decision and found that "the investigation demonstrated a preponderance of the evidence that [DeFalco] engaged in a harassing and disparaging act toward . . .the classified student on or about June 7, 2017 at the Hamilton High School West."

In moving for summary decision, the Board invokes the standard of review that governs the Commissioner's consideration of the action of a local board of education determining that an act of HIB has occurred. That standard requires that the Commissioner affirm the local board's action unless the party challenging the board's determination demonstrates that the board acted in an arbitrary, capricious or unreasonable manner. As the board is by statute the body designated to make the discretionary decision regarding whether an HIB violation has occurred, its discretionary action "will not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. Of Educ., 60 N.J. Super. 288, 294-96 (App. Div. 1960). Thus, if there "is room for two opinions, action is [not arbitrary or capricious] when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Worthington v. Fauver, 88 N.J. 183, 204-05 (1982). As the court noted in Thomas v. Morris Twp. Bd. Of Educ., 89 N.J. Super 327, 332 (App. Div. 1965), the Commissioner will not substitute his or her judgment for that of the Board, as its action is entitled to a presumption of correctness and may not be disturbed unless shown to be arbitrary, capricious or unreasonable. In the Board's view, its action cannot be successfully shown to be tainted by such arbitrariness or unreason, and, given that the material facts relevant to determining that question are not in genuine dispute, summary decision in its favor is warranted and Ms. DeFalco's petition must be dismissed. N.J.A.C. 1:1-12.5; Brill v Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In response to the Board's motion, Ms. DeFalco claims that this traditional review standard cannot be applied to the Board's determination that an HIB incident occurred. She argues that the hearing process that the Board utilized at the "purported 'Board Level' hearing" did not afford Ms. DeFalco constitutional due process, as she was denied the right to

cross-examine the witnesses who provided information in the investigation. Indeed, the Board did not hear from the alleged victim of the comments, or from any of the student or adult witnesses. Instead, it only had before it the school administration's recitation of the investigatory findings and conclusions. Noting what in her view is the due process constitutionally required in the case of a teacher, someone with "liberty and property interests" that are different than those of students accused of HIB infractions (and without considering in her appeal the constitutionality of such process vis-a`-vis students so accused), DeFalco contends that since the basic constitutional due process to which she was entitled was not provided, the application of a deferential "arbitrariness" standard in reviewing the issue of whether DeFalco committed an act of HIB would be improper. In fact, the very process utilized by the Board was itself arbitrary. Additionally, the Board made its decision without having before it "any competent (i.e., first-hand) evidence other than the statements of Ms. DeFalco, and, as such, its decision was made without any "rational basis for its crediting those statements over the first-hand statements of Ms. DeFalco." Given these fundamental deficiencies, the Board must be required to prove its case against her in this forum. Thus, the motion for summary decision should be denied.

In addition to her due process argument, Ms. DeFalco argues that on the facts, her conduct cannot be a violation of the HIB statute or the Board's HIB Policy. In this regard, she claims that the Board decision

> ignored and failed to consider a critical issue: specifically, the circumstances and manner in which a teacher may appropriately refer a classified student to receive special-education services during the school day. In the absence of this information, there is no established legal principle underlying the Board's determination that Ms. DeFalco's referral of the student for such services constituted an act of HIB.

The Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.1 to –32 (Act) prohibits harassment, intimidation or bullying of students, whether such conduct emanates from students or teachers or school administrators. The prohibited acts are defined thusly,

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing

> characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > **a.** a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> > **b.** has the effect of insulting or demeaning any student or group of students; or
> > **c.** creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

While local boards of education are authorized to adopt policies to implement the legislation, the investigation of a complaint of HIB conduct must be carried out in accordance with the requirements of N.J.S.A. 6A:37-15, which dictates certain time limits that must be met for the investigation and determination of such complaints. There is no allegation here that the investigation of this complaint did not meet these time requirements. Here, the Board adopted Policy 5512, addressing "Harassment, Intimidation and Bullying."

The Due Process Issue

In arguing that the Board failed to provide Ms. DeFalco with the due process required by the Due Process Clause of the Sixth Amendment to the United States Constitution, she focuses upon the lack of any ability afforded to her to cross-exam the witnesses who the Board apparently relied upon in deciding that she had committed a prohibited act of HIB. More broadly, her contention that she could not cross-exam means that she could not confront her accusers, including the student allegedly harassed and the student and adult witnesses seen as supporting the allegation. Traditionally, the right of confrontation, including as it may the right to cross-examine, has been guaranteed in criminal matters, as a "fundamental aspect of procedural due process." Jenkins v. McKeithen, 395 U.S. 411, 428 (1969). The ability to cross-examine has been viewed historically as "the greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed. 2d 489, 497 (1970) (quoting 5 Wigmore § 1367); see also

v. Texas, 380 U.S. 400, 404, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965); State v. Branch, 182 N.J. 338, 348 (2005). However, while a criminal defendant is guaranteed such confrontation by the Amendment, the applicability of that right has been generally restricted to the criminal law. Here, counsel for Ms. DeFalco asserts that caselaw has nevertheless argued for its applicability in administrative cases, such as this, where property rights are in jeopardy and the accused individual is threatened with a "badge of infamy" if the charge of HIB conduct is upheld. In order to determine if Ms. DeFalco suffered a constitutional deprivation, it is necessary to review the cases upon which counsel bases his argument that the right exists in this administrative context.

The general proposition that the due process clause's promise of "fundamental fairness" applies to administrative proceedings in which significant property rights are in jeopardy cannot be doubted. Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542 (1985). However, the nature of that due process that conforms to constitutional requirements can vary depending upon the context. Thus, the criminal context, wherein the liberty interest is generally seen as in the most jeopardy, requires the highest level of due process. That due process which is "due" in the civil, and especially in administrative, area can be less stringent.

> Administrative hearings in contested cases may conform to procedural due process standards that are less restrictive than those imposed in court proceedings . . . The issue is whether he received a hearing conforming to principles of fundamental fairness. The determination of whether principles of basic fairness have been afforded in contested administrative cases requires an examination of the facts in each case, giving great weight to the effect of the decision on the agency's public policy.
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> [In re Kallen, 902 N.J. 14, 26 (1983)]

None of the cases cited by counsel have explicitly held that the ability to cross-examine witnesses is an essential element of the fundamental fairness to which one facing an administrative hearing is entitled. In Greene v. McElroy, 360 U.S. 474 (1959), a case arising from the administrative revocation of a security clearance from an engineer which led to his discharge from employment, the Supreme Court discussed the question. The context of national security considerations raised issues of the inherent authority of the President in such matters. The Court explained

[4] Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e. g., Mattox v. United States, 156 U.S. 237, 242-244; Kirby v. United States, 174 U.S. 47; Motes v. United States, 178 U.S. 458, 474; [*In re Oliver, 333 U.S. 257, 273, but also in all types of cases where administrative and regulatory actions were under scrutiny. e g., Southern R. Co. v. Virginia, 290 U.S. 190; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292; Morgan v. United States, 304 U.S. 1, 19; Carter v. Kubler, 320 U.S. 243; Reilly v. Pinkus, 338 U.S. 269. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. Joint Anti-Fascist Committee v. McGrath, 341 U.S. 168-169 (concurring opinion).

Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d ed. 1940) § 1367:

> For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

Little need be added to this incisive summary statement except to point out that under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally.

The Court ultimately did not determine "whether those procedures under the circumstances comport with the Constitution . . . ." Nevertheless, it said

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e. g., ... These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition.
>
> In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures under the circumstances comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limits on executive or legislative authority may be. We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination.

Thus, in a Cold War-era national security-related case where the petitioner's job was terminated and his "work opportunities . . . severely limited," the Supreme Court determined that a procedure that deprived him of confrontation and cross-examination was "fundamentally unfair," even if perhaps not unconstitutional. As such, the case cannot be read as defining the due process constitutionally required in all administrative cases, as indeed even in McElroy, the Court appears to have left open the possibility that had the President or Congress explicitly authorized the process involving a denial of confrontation and cross-examination, the process might meet constitutional standards. And in the other cases cited by the Court in the above-quoted paragraph for the proposition that the protection of "confrontation"might apply in the administrative context, the Court has also not decided the issue squarely. In Southern R. Co. V. Virginia, 290 U.S. 190 (1933), the state's corporation commission required that the railroad construct an overhead bridge. The Court summarized thusly

> As authoritatively interpreted the challenged Act permits the Highway Commissioner—an executive officer—without notice or hearing to command a railway company to abolish any designated grade crossing and construct an overhead when, in his opinion, necessary for public safety and convenience. His opinion is final upon the fundamental question whether public convenience and necessity require the elimination, unless what the Supreme Court denominates "arbitrary" exercise of the granted power can be shown.
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> [Southern R., at 194].

The Supreme Court concluded that

> After affirming appellant's obligation to comply with the Commissioner's order, the court below said: “The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand.” But, by sanctioning the order directing the Railway to proceed, it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily “arbitrary.” There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion.
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> The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed.
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> [Southern R. at 198-99].

Once again, the case reflects on the need for fairness, notice and hearing. But the Court did not address the exact nature of such a hearing, other than that the opponent of the proposed governmental action be advised, in advance, of the nature of the action proposed and given the opportunity to be heard in opposition to such action. These requirements were also emphasized in Morgan v. United States, 304 U.S. 1 (1938), a case testing “the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stock Yard.” Morgan, at 13, where the Court spoke to the need for a “full and fair hearing” and the need for such to provide the “fundamental requirements of fairness.” Chief Justice Hughes explained

> a “full hearing”—a fair and open hearing—requires . . . The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command . . . Congress, in requiring a “full hearing,” had

regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause, a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred ex parte with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

Perhaps the case that comes closest to addressing the issue of whether the right to cross-exam is a constitutionally mandated element of the basic fundamental fairness required in administrative proceedings is Reilly v. Pinkus, 338 U.S. 269 (1949). The Postmaster General ordered that the respondent's use of the mails be restricted due to alleged fraudulent activity. Federal law provided authority for such restriction. The alleged fraud involved advertisements promoting kelp as an aid to weight loss. There was at least some dispute over the scientific value of kelp and iodine for such purposes. Although the Court was convinced that there was sufficient evidence to support the findings that the advertisements misrepresented the respondent's anti-fat treatment based on kelp, the Court nevertheless determined that the order could not stand. In the administrative hearing held before the Postmaster issued the order, cross-examination was permitted, but restrictions were placed upon the respondent's ability to cross-exam doctors testifying for the government who had based at least some of their opinions on medical texts and publications, about which cross-examination was not allowed. The Court noted

> We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books . . .
>
> The power to refuse enforcement of orders for error in regard to evidence should be sparingly exercised. A large amount of discretion in the conduct of a hearing is necessarily reposed in an administrative agency. And what we have said is not to be taken as removing this discretion or as a compulsory opening of the gates for floods of medical volumes, even where shown to be authoritative. But in this kind of case as in others, one against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnesses on the vital

> issue of his purpose to deceive. And in this case any holding of harmless error is precluded by the fact that the assistant solicitor presiding at the hearings adopted the prosecutor's view that respondent was to be barred from using the mails "regardless of the question of good faith, even if the respondent believed in all of his representations . . . if they were false as a matter of fact."

Thus, in Reilly, the Supreme Court, in reviewing a case in which cross-examination was permitted, balked at the limits imposed on that cross. While the decision may be read to hold that cross-examination must, as a general rule, be permitted, at least in cases of "serious charges of fraud," the case does not appear to stand for the proposition that in any administrative proceeding involving any level of possible sanction, the right to cross-examine in an essential part of "fundamental fairness" or of constitutional due process.

With this background concerning the cases that the McElroy Court cited for the proposition that even in administrative and regulatory proceedings a party had the right to "be confronted with the witnesses against him," we must look to recent statements of the Commissioner and Appellate Division concerning the nature of the HIB hearing. In Gibble v. Board of Education of the Hunterdon Central Regional School District, Hunterdon County, http://njlaw.rutgers.edu/collections/oal/final/edu02767-15_1.pdf, the Commissioner explained that staff members of boards of education had the same rights to receive written information about HIB investigations concerning their alleged conduct as students and parents of students investigated for possible HIB infractions had. "It is only reasonable that this due process protection also includes the same right to a hearing before the Board that is provided under N.J.S.A. 18A37-15(b)(6)(d) to parents or guardians of students involved in HIB investigations." This position was endorsed on appeal by the Appellate Division, S.G. v. Board of Educ. of the Hunterdon Cent. Reg'l Sch. Dist., A-5199-15T3 (March 1, 2018)(unpublished). There, the Court added, that while it did not have to detail the exact nature of the scope of such a hearing to decide the case before it, nevertheless, "we point out that the hearing should be meaningful and should be consistent with the procedures for hearings involving students." However, the Commissioner has rejected an argument which the Commissioner characterized as calling for an expansion of "the investigatory process and the HIB determination procedures to mirror discovery and trial-type adversarial proceedings," because such were not within the "intent of the Act." L.K. and T.K., on behalf of minor child, A.K. v. Board of Education of the Township of Mansfield, Burlington County. In her initial

decision in the L.K. case, Acting Chief Administrative Law Judge Lisa James-Beavers noted that while petitioners therein argued for an "evidentiary" hearing, the statute, N.J.S.A. 18A:37-15(b)(6)(d) provides that "[a]t the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents." The Legislature could have added the word "evidentiary" had it wanted to direct a more judicial-type process, but it did not do so. L.K., Initial Decision at http://njlaw.rutgers.edu/collections/oal/html/initial/edu07067-16_1.html.

While it would no doubt be more satisfactory to some if HIB determinations by school boards were made after a full trial-type, judicialized hearing process with full rights to cross-examine witnesses, I **CONCLUDE** that there is simply no constitutional, statutory or case law support for the proposition that in a proceeding such as a Board HIB determination a right to cross-examination exists. The absence before the Board of any direct testimony by the accuser or other witnesses relied upon by the investigator and the Superintendent does not present a ground for finding the process in violation of due process or fundamental fairness. The due process/fundamental fairness requirement in an HIB inquiry is met by a process in which the staff member is made aware of the charges and evidence upon which the charge is based before the Board hearing and is then able to present to the Board such documents, witnesses and testimony and argument as the staff member may offer. The Board may then evaluate this evidence and determine if an incident of HIB occurred. Given the nature of the legislativwe command and the limited sanctions, which do not involve the loss of tenure, employment or future employment (the first two not without additional processes that would, at least in the tenure situation, involve an full arbitration process), a more "judicialized" process is not mandated.

Did Ms. DeFalco Engage in an Act of HIB?

Turning to the substantive question of whether Ms. DeFalco's comments did violate the HIB prohibition and therefore gave the Board sufficient legal grounds to find an HIB violation, in her response to the Board's statement of what the Board asserts are undisputed facts, paragraph 4, she admits that there was a conversation in which she, "in the presence of students and Ms. Kowalski, directed B.L., a classified student in her class who receives special education and related services, to visit the child study team or guidance office if he is

unable or unwilling to perform classwork." She specifically denies the remainder of the paragraph, which claims that her admitted statement to B.L. "direct[ed] attention to B.L.'s status as a special education student." Indeed, it may be that this last, disputed section is not a direct statement of fact, but a conclusion concerning the purported effect of the admitted statement. In her e-mail of June 7, DeFalco reported that she offered B.L. a choice of going to his "counselor or case manager." As for the Board's paragraph 5, she admits that she told B.L. "he should go down to the In-School Alternative Program ("ISAP") if he wants to lay on a desk as that is not permitted in the class." Ms. Kowalski reported the incident in an e-mail of June 12, 2017, wherein she notes that DeFalco asked B.L. if he "wanted to talk to someone in child study or guidance because if [B.] didn't like being there or if the work was too difficult then maybe they could help [B.] or put [B]. in a different class." In his written statement, B.L. reported that he had his head down and Ms. DeFalco first said she was writing him a pass to the nurse, to which he said, "No" and then she said that she was writing a pass "to child studies and I want you to tell them you are struggling in my class." After he said that "I will skip," she told him to go to ISAP and he said "fine." B.L. reported that he felt that Ms. DeFalco had "insulted my intelligence." He felt "ridiculed" and "disrespected."

While there may be some divergence as to the exact words spoken by DeFalco to B.L., the basic fact that she at the very least admits that she openly told the special education student to go to his case manager when he refused to do his work is undisputed. Given that she does not dispute this comment, her contention as to why the Board's decision to find that she had committed an act of HIB, aside from the due process argument, was arbitrary and capricious is that the Board has failed to address the "mechanisms by which a student can be referred to special education services, and the confidentiality procedures, if any, which exist to maintain student privacy with such referrals." It seems that DeFalco is claiming that her words suggesting that B.L. might go to the child study team or guidance office were, possibly in the absence of Board-supplied guidance, simply an acceptable means of referral of the child to the team for the team's support, guidance or for, perhaps, a change in the child's IEP. Frankly, this "defense" appears to be nothing other than a "red herring." There is no question that there can be times when a teacher may observe that a special education student's current IEP may need to be re-evaluated, when a particular class or means of support may not seem to be effective in delivering a child the benefits of an appropriate educational experience (FAPE). In such instances, it would be expected that the teacher would contact

the case manager to raise the concern. But to anyone familiar with the confidentiality elements inherent in the special education context, as well as anyone familiar with and acting with awareness of the HIB strictures, it could not be reasonable to believe that a public statement to a classified student that he should go to the child study team due to a perceived inability or unwillingness to do the classwork is an acceptable form of reference to the child study team or for the purpose of enabling that student to receive assistance with needed special education services. Such a statement, made in front of other students, has the distinct capacity to point out to the other students the actual or perceived characteristic of the subject student's mental or sensory disability. If Ms. DeFalco truly believed that the student's ability to handle the work in her class was in doubt due to issues related to his special education status, it is hard to imagine that she would not have understood that she could privately contact the case manager or other responsible child study team member and raise her concern. Indeed, in her e-mail of June 7, she specifically asked Ms. Scaringelli for the name of the case manager. The claim that the Board has not provided information about how to appropriately refer a student ignores the fact that no reasonable teacher aware of the need for confidentiality and trained concerning HIB would choose to publicly announce her concern or her direction to the student in front of his peers, an action that reasonably could be foreseen as embarrassing and demeaning to the student. Thus, as I **FIND** that the Board was well aware of the evidence of Ms. DeFalco's comments, as reported in the investigation by her, by Ms. Kowalski, who was present when they were made, and by B.L., it could quite reasonably found that

A) DeFalco knew, or should have known, that her comments would have the effect of placing this special education student in reasonable fear of emotional harm;

B) had the effect of insulting or demeaning him; and

C) created a hostile educational environment for B.L.

As such, as I **FIND** that there are no material facts in dispute, I **CONCLUDE** that the Board's decision was neither arbitrary nor capricious.

ORDER

IT IS HEREBY ORDERED that the contested case is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 25, 2019	
DATE	**JEFF S. MASIN**, ALJ (Ret., on recall)
Date Received at Agency:	______________________
Date Mailed to Parties:	______________________

mph

LIST OF EXHIBITS:

For petitioner:

Exhibit A	Respondent's Answers to Interrogatories and Request for Production of Documents
Exhibit B	Policy 2466-Needless Public Labeling of Pupils with Disabilities

For respondent:

Exhibit A	Letter dated December 29, 2017
Exhibit B	Target/Accused/Witness Interview Statement of B.L.
Exhibit C	Interview of Ms. DeFalco, dated June 22, 2017
Exhibit D	Interview of Lisa Kowalski, June 19, 2017
Exhibit E	Interview of Jessica Zipko, June 19, 2017
Exhibit F	E-mails from T. DeFalco, June 7, 2017
Exhibit G	E-mail from Jessica Zipko to Brian Smith, June 8, 2017
Exhibit H	E-mai, from Lisa Kowalski to Brian Smith, June 12, 2017
Exhibit I	Letter dated June 14, 2017
Exhibit J	Superintendent’s HIB Report
Exhibit K	Letter dated July 27, 2017
Exhibit L	Letter dated October 9, 2017
Exhibit M	Policy 5512 Harassment, Intimidation and Bullying